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State v. Anderson Respondent's Brief 1 Dckt. 39510

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. MICHAEL PAUL ANDERSON, Defendant-Appellant.	)	No. 39510 Ada Co. Case No. CR-2011-11344

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature Of The Case

Michael Paul Anderson appeals from the judgment entered upon the jury verdicts finding him guilty of two counts of aggravated assault and a weapon enhancement. Anderson contends the district court erred in denying his motion for mistrial based on a prospective juror's comment during voir dire.

Statement Of The Facts And Course Of The Proceedings

Around 10:00 p.m. one evening, Anderson entered a Rite Aid store, asked the cashier, Gloria Benton, where the beer was, and returned to Gloria's line with a "12-pack." (Trial Tr., p.39, L.13 – p.40, L.13.) When Anderson returned to the check-out line, Gloria was helping another customer, and Anderson started complaining about how long she was taking. (Trial Tr., p.40, Ls.19-25.) Although Gloria assured Anderson she would help him next, Anderson remained upset, was mumbling, and using "foul language." (Trial Tr., p.40, L.24 – p.41, L.6, p.91, Ls.5-14.)

Sherri Espinola, Gloria's shift supervisor, overheard Anderson and told him his behavior was inappropriate, advised him they would not sell him any beer, and she removed the beer from the counter. (Trial Tr., p.41, L.7 – p.42, L.14, p.93, L.20 – p.94, L.2.) When Sherri removed the beer, Anderson threatened her and Gloria by showing them a knife clipped to his waistband and telling them he would "take care" of them. (Trial Tr., p.42, L.15 – p.44, L.9, p.95, Ls.3-16.) Anderson's knife was in a sheath and had a six-inch fixed blade. (Trial Tr., p.45, Ls.8-9, p.146, Ls.6-9.)

Understandably afraid, Sherri called 911, while Gloria, who was also scared, tried to get Anderson to leave the store. (Trial Tr., p.48, Ls.1-7, p.49, Ls.18-20, p.52, Ls.2-8, p.96, L.18 – p.97, L.3.) Anderson eventually left and was walking down the sidewalk where he was stopped by law enforcement. (Trial Tr., p.52, Ls.10-11, p.117, Ls.5-15.)

When law enforcement first made contact with Anderson, he refused to follow their verbal commands and continued to approach them although one officer had his weapon drawn. (Trial Tr., p.120, L.23 – p.122, L.22.) Anderson, however, eventually complied and got down on his knees where he was ultimately disarmed. Anderson was subsequently arrested and transported to the jail. During transport, Anderson continued to act belligerent, was "rant[ing]" and "rav[ing]," and referred to himself repeatedly as the "chief U.S. marine." (Trial Tr., p.122, L.22, p.132, L.17 – p.133, L.6, p.152, L.2 – p.153, L.18.)

The state charged Anderson with two counts of aggravated assault and use of a deadly weapon during the commission of crime. (R., pp.5-6, 23-27.) Anderson pled not guilty and the case proceeded to trial. (R., p.34.)

During voir dire, in response to a question about whether any of the prospective jurors had knowledge of the case, Juror 12 responded: "I am an Ada County deputy sheriff. I've been involved in the defendant's incarceration." (Supp. Tr., p.15, Ls.8-14, p.16, Ls.15-18.) The court asked, "So you have some personal knowledge of the case?" to which Juror 12 stated, "I don't know anything about the case. I've just -- he's been in my housing unit before." (Supp. Tr., p.16, Ls.19-23.) At that point, defense counsel asked to approach and there

was a bench conference. (Supp. Tr., p.17, Ls.1-3.) Following the bench conference, the court instructed the jury panel as follows:

> Ladies and Gentleman of the Jury, you just heard Juror No. [12] make a statement concerning his knowledge of the defendant. There will be evidence in this case that the defendant was arrested and taken to jail. It's a criminal case. That is not in itself evidence of his guilt; it will be simply one of the facts that comes out during the trial. And you're not to use that fact as evidence of guilt. So that -- please do not -- as I said, the defendant enjoys the presumption of innocence, so the mere fact that he was arrested does not mean he was guilty of anything at all, merely that someone brought a charge.

(Supp. Tr., p.17, Ls.5-18.)

Later, outside the presence of the jury panel, defense counsel made a record of his request for a mistrial based on Juror 12's comments regarding the circumstances under which he was familiar with Anderson, arguing that informing the jurors that Anderson had been in custody "taint[ed]" them since Juror 12 "specifically said 'before'" instead of "with this incident." (Supp. Tr., p.75, Ls.7-21.) The court set forth its reasons for denying the motion:

> [W]e discussed this at side bar, and I overruled the objection for the reason that I don't believe that it unfairly taints the jury in the context in which the comment was made. You can take it "in my unit before" as having been in connection with this, and I believe the instruction that I gave will be adequate to resolve any potential problems with the jury because they are going to, in fact, be told by the prosecution the evidence will include the fact the defendant was arrested. The natural consequence is being taken to jail. I don't see that as being a grounds [sic] for mistrial at this point.
>
> So that objection will be overruled. I will advise the parties that it is my intention to excuse that juror for cause. Even in the absence of -- I can tell you that now so you don't feel the need to question him and run the risk of further potentially tainting the jury to the point of getting a mistrial.

(Supp. Tr., p.75, L.22 – p.76, L.17.) After the panel returned, and following questioning of a different juror, the court excused Juror 12. (Supp. Tr., pp.79-84.) The parties continued voir dire and both passed the panel for cause. (Supp. Tr., pp.84-142.) The parties then exercised their peremptory challenges and the selected jury was accepted by both sides and was sworn by the clerk. (Supp. Tr., p.142, L.14 – p.144, L.19.)

After trial, the jury found Anderson guilty of both counts of aggravated assault and the weapon enhancement. (R., pp.96-98.) The court imposed a unified five-year sentence with one year fixed on the first count of aggravated assault and a concurrent unified, enhanced sentence of ten years with one year fixed on the second count of aggravated assault. (R., pp.102-04.) Anderson filed a timely notice of appeal. (R., pp.108-110.)

ISSUE

Anderson states the issue on appeal as:

> Whether the district court erred by not declaring a mistrial after the potential jury pool was tainted by comments on Mr. Anderson's incarceration and by comments on his guilt and ability to assert his innocence against the State's evidence.

(Appellant's Brief, p.7.)

The state rephrases the issue as:

Has Anderson failed to show error in the district court's conclusion that events in jury selection did not require a mistrial?

ARGUMENT

Anderson Has Failed To Show Error In The District Court's Denial Of His Motion For A Mistrial

A. Introduction

Anderson contends the district court erred by not granting his motion for a mistrial after Juror 12 "informed the pool that Mr. Anderson had been incarcerated 'before.'" (Appellant's Brief, p.8.) Anderson further argues that even assuming Juror 12's "comment alone was insufficient to justify a mistrial, subsequent comments" by a different prospective juror, which he did not object to, "compounded the error to the point that a mistrial should have been declared," apparently *sua sponte*. (Appellant's Brief, p.8.) Application of the correct legal standard shows both of Anderson's claims fail.

B. Standard Of Review

On appeal, the standard for review of a motion for mistrial is well-established:

> [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of the circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. [The appellate court's] focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Shepherd, 124 Idaho 54, 57, 855 P.2d 891, 894 (Ct. App. 1993) (citations omitted). Anderson bears the burden of showing that the trial court

committed reversible error when it denied his motion for a mistrial. State v. Rodriquez, 106 Idaho 30, 674 P.2d 1029 (Ct. App. 1983). The appellate court reviews the full record to determine if the event that triggered the motion for mistrial "represented reversible error when viewed in the context of the full record." Rodriquez, 106 Idaho at 33, 674 P.2d at 1032.

C. Anderson Has Failed To Show An Abuse Of Discretion In The Denial Of His Motion For A Mistrial

A mistrial is appropriate where there has been conduct, inside or outside of the courtroom, that is "prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a). Thus, the event triggering the mistrial motion must be both prejudicial and deprive the defendant of a fair trial in order to warrant a mistrial.

To show that he was denied a fair trial, Anderson must show that the jurors heard the prospective jurors' comments and that they were, in fact, prejudiced by the comments. See State v. Slater, 136 Idaho 293, 301, 32 P.3d 685, 693 (Ct. App. 2001) (to show that a defendant was prejudiced by being briefly viewed wearing restraints or jail clothes, there must be some evidence that the jury saw the restraints and thereby drew a conclusion regarding the defendant's character); State v. Wachholtz, 131 Idaho 74, 77, 952 P.2d 396, 399 (Ct. App. 1998) ("[t]he defense provided no evidence that any juror was aware of – much less prejudiced by – the stun belt incident"). Although a criminal defendant is entitled to a fair jury panel, it is sufficient that the jurors may render a verdict based on the evidence presented in court instead of information

gathered outside of that evidence. Murphy v. Florida, 421 U.S. 794, 795 (1975) (quoting Irwin v. Dowd, 366 U.S. 717 (1961)). The purpose of voir dire is to discover if potential jurors are not qualified to sit as jurors, and a defendant is not entitled to a mistrial based on statements by potential jurors in voir dire unless there is a "continuing impact on the trial." State v. Laymon, 140 Idaho 768, 771, 101 P.3d 712, 715 (Ct. App. 2004) (no continuing impact due to curative instruction).

Anderson has failed to demonstrate Juror 12's comments had a continuing impact on his trial. In response to a question about whether any of the prospective jurors had knowledge of Anderson's case, Juror 12, an Ada County deputy sheriff, stated he had been "involved in [Anderson's] incarceration" and that Anderson had "been in [his] housing unit before." (Supp. Tr., p.16, Ls.15-23.) In order to address defense counsel's concern that the comment could be interpreted to mean that Anderson had been in jail in relation to an event other than the one that resulted in the criminal charges in this case, the court instructed the panel that they would hear evidence that Anderson was taken to jail but that such evidence could not be considered as evidence that Anderson was guilty. (Supp. Tr., p.17, Ls.5-18, p.75, L.9 – p.76, L.10.)

Anderson argues that the panel could have interpreted Juror 12's comments one of two ways, both of which he claims are improper. (Appellant's Brief, pp.9-11.) First, Anderson contends the jurors could have understood Juror 12's comments to mean that he "was incarcerated on this charge and remained incarcerated at the time of trial." (Appellant's Brief, p.9.) Anderson asserts this

interpretation required a mistrial because "references to the fact that a defendant has been or remains jailed on the charged offense are inappropriate and prejudicial." (Appellant's Brief, p.9.) This argument fails because it is contrary to the grounds Anderson stated in support of his motion for a mistrial and is effectively a challenge to evidence at trial that is being raised for the first time on appeal. State v. Parsons, 153 Idaho 666, ___, 289 P.3d 1059, 1061 (Ct. App. 2012) ("Idaho appellate courts generally will not consider an assertion of error on appeal unless the issue was preserved in the trial court proceedings.") (citations omitted). The stated basis for the motion for mistrial was the concern that prospective jurors may have understood Juror 12's comments to mean that Anderson had been in jail "before," and not in relation to "this incident." (Supp. Tr., p.75, Ls.15-21.) Anderson's appellate argument that a mistrial was required because the jurors received information that he was incarcerated on "this charge," was not preserved either as a basis for the motion for a mistrial or as an evidentiary matter since there was no objection to evidence that Anderson was, in fact, taken to jail when he was arrested on the aggravated assault charges.

Anderson's appellate argument that his motion should have been granted because the jurors could have interpreted Juror 12's comments to mean that he remained incarcerated at the time of trial is also not preserved. Moreover, this interpretation of Juror 12's comments is not reasonable given Juror 12's use of the past tense in referring to his involvement with Anderson's incarceration and the court's curative instruction. Even if the interpretation was reasonable, the court's curative instruction addressed any potential lasting prejudicial impact from

Juror 12's comments. Anderson's claim that the instruction did not cure any potential lasting prejudice is unpersuasive.

Anderson argues the court's curative instruction did not "alleviate the undertone that permeated the proceedings from that point forward: that Mr. Anderson was in jail, and thus more likely to be guilty." (Appellant's Brief, p.12.) This argument does nothing more than assume the jurors ignored the instruction; an assumption that is itself contrary to law. State v. Thumm, 153 Idaho 533, ___, 285 P.3d 348, 359 (Ct. App. 2012) (it is presumed that jurors follow the court's instructions).

Anderson further argues "the fact that Juror 12 was not immediately dismissed for cause indicated to the jury that his comments were not overly problematic." (Appellant's Brief, p.12.) According to Anderson, this may have led "other potential jurors . . . not to speak up, even though they have had underlying biases against [him]." (Appellant's Brief, p.12.) Anderson reasons, "After all, if one of the officers who oversees [his] incarceration is allowed to remain in the jury pool, why should their own biases as to guilt be more problematic that Juror 12's?" (Appellant's Brief, pp.12-13.) In addition to being entirely speculative, Anderson's argument is contradicted by his subsequent reliance on biases expressed by Juror 32 in support of his claim that he was entitled to a mistrial for reasons other than Juror 12's comments, which will be addressed in Section D, *infra*. Moreover, Anderson's argument is predicated on a remedy he did not request below, *i.e.*, immediate removal of Juror 12 for cause.

Because Anderson has failed to show Juror 12's comments had any continuing impact on his trial, he has failed to establish error in the district court's denial of his motion for mistrial.

D. Juror 32's Comments And The District Court's Instruction Regarding Use Of The Word "Victim" Are Irrelevant To Anderson's Motion For Mistrial

Anderson contends, "Two comments subsequent to Juror 12's prejudicial remarks further demonstrate that the jury pool was tainted and a mistrial should have been ordered." (Appellant's Brief, p.13.) Specifically, Anderson complains that Juror 32, a "former legal assistant with thirty years of experience made a rather concerning statement about how the trial process should work after declaring herself to be 'very biased.'" (Appellant's Brief, p.13.) In particular, Anderson cites to the following voir dire of Juror 32:

> [PROSECUTOR]: Can you let go of your former life and just accept the role as a juror if you are selected here?
>
> JUROR 32: I don't know. I'm very biased, very biased.
>
> [PROSECUTOR]: Okay. For or against who?
>
> JUROR 32: I have no use for people with a victim mentality.
>
> . . . .
>
> [PROSECUTOR]: Can you tell me what a victim mentality is?
>
> JUROR 32: Won't or can't take responsibility for their own actions or interactions. It's always somebody else's fault.
>
> [PROSECUTOR]: Okay. Well, let me ask you this: They're [sic] going to be some people who come in, and they are going to say, "This thing happened. I saw this, I heard this. I felt like this." The court may occasionally call them victims because that's what the law calls them, but –

[DEFENSE COUNSEL]: Judge, I will object to that. There is no determination on that. I think the court will instruct the jurors on that.

THE COURT: I will note your objection, [Counsel].

And, [Mr. Prosecutor], I do my best to refer to them as alleged victims, because that's what they are until the close of the evidence. But I think we understand, so I will overrule the objection. You may inquire.

[PROSECUTOR]: Thank you. He cut me off.

The point, ma'am, is that these people who – we call them alleged victims. They are the people the state says that this crime happened to.

JUROR 32: I understand that. That is not a victim mentality.

[PROSECUTOR]: Okay. That answered that question.

My other question is, I don't know -- you understand that Mr. Anderson has no duty to present a defense or any evidence, okay? I have to put on enough evidence to convince all of you beyond a reasonable doubt that the things happened that the judge says have to happen before you can check the guilty box, right?

If he chooses to present evidence and it is evidence, or his lawyer chooses to question the witnesses, the gist of which is, "Well, it didn't happen that way," or, "You shouldn't believe him," or, "It happened, but it doesn't mean what the state says it means," is that going to be a victim mentality for you?

JUROR 32: Yes.

[PROSECUTOR]: Okay. Well, you kind of understand that's the way the system works, right?

JUROR 32: I don't believe it's the way the system is meant to work.

[PROSECUTOR]: Okay.

JUROR 32: It is the way it works unfortunately.

(Supp. Tr., p.80, L.17 – p.83, L.5.)

Anderson acknowledges that he did not object to Juror 32's comments, or request a mistrial based on her comments, but contends such was unnecessary to this Court's consideration of whether the district court should have granted his earlier motion for mistrial in relation to Juror 12's comments. (Appellant's Brief, p.14.) While it is true that this Court considers the "full record" in deciding whether a trial judge should have granted a motion for mistrial, it does so for the purpose of assessing "the continuing impact on the trial of the incident that triggered the mistrial motion." Shepherd, supra. Such review does not, as Anderson suggests, encompass a review of all alleged errors in the proceedings. (Appellant's Brief, p.15 ("where, as here, the jury pool was subjected to prejudice by first one, then another juror's comments, the appellate court should vacate the conviction and remand for a new trial because of the aggregated prejudice, even though the motion for a mistrial may not be renewed").)

There is absolutely no relationship between Juror 32's expressions of bias and Juror 12's comment that Anderson was in his "housing unit" at the jail, and Anderson has identified no such relationship. Rather, Anderson asserts that because he believes both comments were prejudicial, a mistrial "should have been declared." (Appellant's Brief, pp.8, 15.) This is not the standard of review of the motion that was made and Anderson has failed to cite any authority that compelled the trial court to *sua sponte* declare a mistrial as a result of Juror 32's unrelated comments.

In relation to Juror 32's responses, Anderson also complains "[t]here was no curative instruction." (Appellant's Brief, p.14.) Anderson did not, however,

request such an instruction and it is unclear why Anderson believes the court is required to give an instruction to "cure" a potential juror's expression of bias. Such an instruction seems contrary to the very purpose of voir dire, which is to discover bias and remove those individuals who are not qualified to serve on the jury. Laymon, 140 Idaho at 771, 101 P.3d at 715.

Anderson also takes issue with the court's response to counsel's objection to the prosecutor's use of the word "victim" to describe the witnesses who would testify in support of the aggravated assault charges. (Appellant's Brief, p.16.) Anderson asserts "[t]he natural implication" of the court's statement, "I do my best to refer to them as alleged victims, because that's what they are until the close of evidence," was that "once the evidence period closes, then we can refer to them as actual victims, as opposed to 'alleged' victims because the evidence will show that they were actually victimized by the defendant." (Appellant's Brief, p.16.) Of course, Anderson can cite to nothing to support his assertion that this is how the prospective jurors interpreted the court's comment (made at defense counsel's urging), and, in any event, he has failed to identify how the court's comment was the result of Juror 12's earlier statement about Anderson's incarceration.

Not all of Anderson's perceived flaws of what occurred during voir dire are relevant to the issue before this Court – whether the district court's denial of the motion for mistrial, viewed retrospectively, constituted reversible error. In fact, Anderson has failed to identify any continuing impact resulting from Juror 12's

comments, *i.e.*, the incident that triggered the mistrial motion. As such, Anderson has failed to establish error in the denial of his motion for mistrial.[1]

CONCLUSION

The state respectfully requests this Court affirm Anderson's convictions.

DATED this 30th day of January, 2013.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of January, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General

JML/pm

[1] In addition to attempting to cumulate perceived errors under the motion for mistrial standard of review, it appears Anderson also contends he is entitled to relief under the cumulative error doctrine. (Appellant's Brief, p.17.) "[I[t is well-established that alleged errors at trial, that are not followed by a contemporaneous objection, will not be considered under the cumulative error doctrine unless said errors are found to pass the threshold analysis under our fundamental error doctrine." State v. Perry, 150 Idaho 209, 230, 245 P.3d 961, 982 (2010). Because Anderson has not even attempted to demonstrate fundamental error in relation to his unpreserved complaints about voir dire, and because he has failed to establish any error in relation to the motion for mistrial, the cumulative error doctrine does not apply.